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No. 318 and 319

In the

Supreme Court of the United States

OCTOBER TERM 1962

UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

v.

HORACE HART,
Respondent.

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

MARCOS V. AGUIRRE, JR.,
Respondent.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

The instant cases involve the determination of federal jurisdictional amount in diversity suits by workman's compensation insurers to set aside awards of the Texas Industrial Accident Board. This question was recently before this Court in *Horton v. Liberty Mutual Insurance Company, 367 U. S.*

318. In *Horton* the compensation insurer brought suit to set aside a Board award of $1,050 and *correctly* alleged that the defendant employee would claim more than $10,000. The employee in *Horton* moved to dismiss for want of federal jurisdiction, and subject thereto, admitted he would claim more than $10,000 in federal court, and filed a counterclaim in federal court for $14,035. In the cases at bar the insurance carriers brought separate suits to set aside Board awards of $330.50 (McIntyre), $910 (Hart), and $146.65 (Aguirre), respectively. The Respondent employees in each instance denied the existence of federal jurisdictional amount and filed claims for less than $10,000 in federal court. At no time was there an actual controversy in federal court involving the jurisdictional minimum. The Court of Appeals in applying the *Horton* rule held in all three cases that the federal jurisdictional amount requirement was *not* satisfied.

QUESTION PRESENTED

1. Does federal jurisdictional amount exist in workman's compensation insurer's diversity suit to set aside administrative board's award of less than $10,000 where defendant-employee (Respondent) claims less than $10,000 in federal court.

STATEMENT

Hart v. United States Fidelity and Guaranty Company, No. 318.

Respondent-Hart, an injured workman, filed a general claim (hurt back) with the Texas Industrial Accident Board.

and was awarded $910. Respondent-Hart did not claim any specific sum of money before the Accident Board. Petitioner-insurer brought suit in federal court to set aside the $910 award, alleging that the amount in controversy exceeded $10,000. The defendant employee (a) moved to dismiss for want of federal jurisdiction, (b) denied that the amount in controversy exceeded $10,000, and (c) counterclaimed for $6,310. The Respondent-Hart also brought suit in state court to set aside the award and to obtain $6,310 in compensation. The Petitioner filed a plea in abatement to respondent's state suit and that action is still pending. On the day of trial, the Respondent consented to federal jurisdiction over his $6,310 claim and trial resulted in a judgment in his favor for $1,224. At no time was there an actual claim in federal court for more than $6,310. The Court of Appeals reversed, holding federal jurisdiction did not exist. Respondent-Hart's petition for writ of certiorari filed in *advance* of the judgment of the Court of Appeals was denied. 368 U. S. 899.

Standard Accident Insurance Company v. Aguirre, No. 319.

Respondent-Aguirre filed a claim for total and permanent disability with the Texas Industrial Accident Board and was awarded $146.65. Petitioner insurer brought suit in federal court to set aside the award, alleging that the amount in controversy exceeded $10,000. Later that same day Respondent-Aguirre brought suit in State Court to set aside the Board's award and to claim $14,035 in compensation. Respondent (a) moved to dismiss the Petitioner's federal suit for want of federal jurisdiction; (b) denied the existence of

federal jurisdictional amount; and (c) counterclaimed in federal court for $8,750. The Respondent-employee then amended his state court complaint to seek only $8,750 and filed a stipulation in federal court that he would not amend his state petition to claim a greater sum. The federal district court after a *hearing* on the jurisdictional issues dismissed for want of jurisdiction. The Court of Appeals affirmed.

SUMMARY OF ARGUMENT

The decisions below do not conflict with any applicable decision by this Court. In *Horton v. Liberty Mutual Insurance Company, 367 U. S. 348*, the plaintiff-compensation insurer's federal complaint *correctly* alleged that the defendant-employee would claim more than $10,000 in the federal action. The basic premise urged by Petitioners is that the existence of the amount in controversy is determined by the plaintiff's complaint. Respondents, however, contend that the plaintiff's allegations do not create an irrebuttable fiction. The basic premise of Respondents is that where the plaintiff-insurer's federal complaint *incorrectly* alleges (or fails to allege) that the employee will claim more than $10,000 in federal court, *federal jurisdiction does NOT exist*. Once a jurisdictional allegation is traversed, the suit must be dismissed unless the plaintiff (petitioner) proves its allegation to be correct. *McNutt v. General Motors Accept. Corp., 298 U. S. 178*. An incorrect jurisdictional allegation can not and does not affix jurisdiction. Because the respondent-employee

is the master of the sum for which he will counterclaim, a denial by the employee that he will claim in federal court more than $10,000, or a counterclaim for less than $10,000, will establish as a matter of law the *non-existence* of federal jurisdictional amount. A party has the right to claim less than $10,000 for the express purpose of defeating federal jurisdiction. *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294.*

Under the substantive rights created by the Texas Workmen's Compensation Act: (1) the suit to set aside the Board's award does *not* revive the amount of the initial administrative claim; (2) the suit by the insurer does *not* put into issue the employee's right to compensation as the employee must affirmatively counterclaim; and (3) the insurer's right is *not* declaratory in nature, hence declaratory judgment cases are not applicable. Article 8307, Section 5, Texas Civil Statutes; *Booth v. Texas Employers' Ins. Ass'n, 132 Tex. 237, 123 S. W. 2d 322; Morris v. Maryland Casualty Co., 130 S. W. 2d 1080.* In the case at bar the largest judgment by the federal court that could be rendered when the insurer's federal suit was filed would be the amount of the Board's award (here $910.00 and $146.56); the largest judgment that could be rendered after the employee's answer and counterclaim would be the amount of the counterclaim (here less than $10,000). Thus it is a "*legal certainty*" that the federal court could *never* have entered a judgment above the jurisdictional minimum. Since it is legally impossible to enter a judgment for more than $10,000, *federal jurisdiction*

fails. Vance v. Vandercook Co. (No. 2), 170 U. S. 468, 472. See *Horton v. Liberty Mutual, 367 U. S. 348, 353.*

The amount the employee claimed before the Board does not determine federal jurisdiction. *Horton v. Liberty Mutual, 367 U. S. 348.* Likewise the amount claimed (or that could be claimed) in a collateral state court suit can not be used to affix federal jurisdiction. *Cf. Healy v. Ratta, 292 U. S. 263; Elgin v. Marshall, 106 U. S. 578.* Moreover the federal court does not have power to restrict the employee's claim before the state court. 28 U. S. C. §2283; See *Amalgamated Clothing Workers v. Richman, 348 U. S. 511.*

It is not the obligation of the federal court to "find" jurisdiction where none appears; it is the obligation of the *plaintiff* to show jurisdiction. The federal judicial policy has traditionally been against the expansion of federal jurisdiction. Our courts recognize they have a duty to dismiss for want of jurisdiction. *Healy v. Ratta, 292 U. S. 263; American Fire & Cas. Co. v. Finn, 341 U. S. 6.* Congress has commanded under 28 U. S. C. §1332(a), that diversity actions can not be brought in federal court unless the matter in controversy therein exceeds $10,000. These suits do not come within the statute. Federal jurisdiction fails.

ARGUMENT

1. THE DECISIONS BELOW ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

For the reasons which follow it is respectfully submitted that the Fifth Circuit holding is in full accord both with the Supreme Court's decision in *Horton v. Liberty Mutual Insur-*

ance Company, 367 U. S. 348, and with the established concepts of federal jurisdiction. Petitioners try to misrepresent the holding below in order to manufacture a conflict.

Before specifically discussing the *Horton* case and related jurisdictional doctrines, it is essential that there be an accurate understanding of the precise nature of the rights created under the Texas Workmen's Compensation Act. As stated in *Horton*, although the test for determining federal jurisdiction is purely a matter of federal law, the nature of the substantive rights created is entirely a matter of local law. 367 U. S. 348, 352-353.

A. *Nature of Rights Created by Texas Compensation Act.*

1. *Insurer's Right Is to Set Aside Award.*

Under the Texas statute, Article 8307, Section 5, the *insurer*, where dissatisfied with the Board's award, is given the right to set it aside by merely filing a suit for such purpose. The insurer's sole right is to set aside the Board's award. And this right does *not* put in issue the employee's right to any sum in excess of the Board's award. It is firmly established under Texas law that if the employee wishes to put in issue a greater sum than the Board's award the defendant-employee must actually file an affirmative counterclaim.[1] The Supreme Court in *Horton*

[1] In *Morris v. Maryland Casualty Co., 130 S. W. 2d 1080 (Tex. Civ. App. 1939)*, the employee filed a general claim before the Board which would entitle him to claim total and permanent disability in a subsequent court suit. The Board awarded $450 which satisfied the employee. The insurer brought suit to set aside the award in the Texas County Court which has a maximum jurisdiction of $1,000. The employee moved to dismiss alleging that the amount in controversy was over $1,000. Since the employee did not counterclaim for over $1,000, jurisdiction was upheld and the Board's award was automatically vacated. The *Morris* case is a correct application of Texas law. *See Bowles v. Texas Employers' Ins. Assn., 132 Tex. 247, 123 S. W. 2d 323 (1938).*

recognized the true nature of the Texas act by citing the controlling Texas decisions of *Booth v. Texas Employers' Ins. Assn., 132 Tex. 237, 123 S. W. 2d 322; Zurich General Accident Co. v. Rodgers, 128 Tex. 313, 97 S. W. 2d 674; Texas Reciprocal Ins. Assn. v. Ledger, 128 Tex. 319, 97 S. W. 2d 677*, (the latter case illustrates the right and necessity of the employee to cross-act when the insurer brings suit to set aside the award).

2. Insurer's Right Is Not Declaratory in Nature.

The nature of the Texas act precludes the use of declaratory judgment cases as authority in determining jurisdiction amount for at least two reasons. First of all, the insurer has *no* right to seek *general declaratory relief* for either determining questions of liability or compensation; its rights are governed under the specific statute.[2] Thus the Petitioner's argument that it brought suit to be relieved of a "potential" liability has no merit. Second, even if the instant suits by the insurers could be classified declaratory in nature, federal jurisdictional amount could not exist. The insurer's suit is not, and indeed could not be, a declara-

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[2] Article 8[illegible] section 5, details the conditions and basis for setting aside the Board's award, including the requirement that notice not to abide be filed with the Board and suit be thereafter commenced within twenty days. If either the insurer or the workman fail to follow such steps the Act expressly provides that "then said [Board's] final ruling and decision shall be binding upon all parties thereto. * * *" There is no reported case in which an insurer or employee has been permitted to review the Board's award under the Texas Declaratory Judgment Act (Article 2524, Vernon's Civil Statutes).

tory action to cancel an insurance policy where the face amount of the policy governs jurisdictional amount.

The *coup de grace* to a declaratory judgment argument is delivered by the *Horton* decision. For although the dissent in *Horton* question the majority of predicating jurisdictional amount as though the suit were declaratory in nature, the *Court's opinion* was very careful not to predicate its holding on a declaratory basis.

B. *Application of Horton decision.*

The position of the workman in *Horton* was that federal jurisdictional amount had to be determined by the plaintiff's cause of action without reference to any counterclaims, and that the plaintiff's (insurer's) cause of action was only to set aside the Board's award.[4] Neither the majority nor dissenting members of the court questioned the position that the insurer's right was only to set aside the award. The cleavage in *Horton* came on the issue of whether jurisdiction existed where the plaintiff *correctly* alleged that the employee would counterclaim for more than $10,000. This *correct* allegation was the basis of the

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E.g. in *Hartford Accident & Indemnity Co. v. Northwest National Bank*, 228 F. 2d 391, 402 (7th Cir. 1955), jurisdictional amount was upheld because the declaratory judgment proceeding brought into controversy the validity of the policy and hence its face amount. In the cases at bar the employee is only a beneficiary and the insurance companies cannot (and are not attempting to) proceed against the employee for a declaration that the policy issued to the workman's employer is void. Such suit could only be brought against the employer.

[4] *Horton v. Liberty Mut. Ins. Co.*, No. 478, October Term, 1960, Brief For the Petitioner, p. 17: "Petitioner's basic position is that the amount in controversy under 28 U.S.C. § 1332 is to be determined from the claim for relief, i.e., the cause of action, asserted by plaintiff's (Respondent's) complaint." *Id.*, p. 16: "The Respondent-insurer's cause of action *is* to set aside the $1,050 award; nothing more. It is the Petitioner-employee who was injured and who has the right to seek compensation. The insurer's right is to set aside the Board's award."

Supreme Court holding that federal jurisdictional amount existed. The precise issue now before this Court is whether federal jurisdictional amount is present where the plaintiff-insurer *incorrectly* alleges that the defendant-employee will claim more than $10,000 in federal court.

Under applicable Supreme Court cases the incorrect allegation that the injured employee will claim more than $10,000 in federal court is not sufficient to *affix* federal jurisdiction. It is well established that a mere allegation that the jurisdictional amount is present does not create any irrebuttable fiction. In *McNutt v. General Motors, 298 U. S. 178*, the plaintiff alleged that the jurisdictional amount was present: the defendant denied such allegation. The case was dismissed for want of jurisdiction. The *McNutt* rule is: If a jurisdictional allegation is denied, the action must be dismissed unless the plaintiff (party invoking federal jurisdiction) proves the existence of jurisdiction. This is exactly what the district court did here in Aguirre.

Although, generally speaking, the amount claimed by the plaintiff controls for purposes of establishing jurisdictional amount of unliquidated sums, there are two exceptions to this general rule: (1) where plaintiff's claim is not made in "subjective" good faith and (2) *where it would be legally impossible for a judgment to be rendered which would satisfy the jurisdictional amount requirement* (objective good faith). In the cases at Bar it is not necessary for the trial court to make a determination of the plaintiff-insurer's *subjective* good faith for it appears to a *legal*

certainty" that at no time could a judgment have been rendered in excess of the jurisdictional minimum. See *Horton v. Liberty Mutual*, *367 U. S. 348, 353*, and cases cited therein at note 13. At the time the Petitioners-insurers' suit was filed a judgment could not possibly exceed the amount of the Board's award ($910 and $146.65). After the Respondent-employee had answered and filed his counterclaim, the largest judgment that could be possibly entered would be for the amount of such counterclaim (which was beneath the federal jurisdictional amount).

The Supreme Court in *Vance v. Vandercook Co. (No. 2)*, *170 U. S. 468-672*, held:

> "In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that *if from* the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum."

This principle that federal jurisdiction fails if it is legally impossible to grant a judgment in excess of the jurisdictional minimum was recognized by this Court in *Bell v. Preferred Life Assurance Society*, *320 U. S. 238*. Jurisdiction existed in *Bell* because the Court held it was legally possible for the plaintiff to claim such punitive damages, which when added to the actual damages sought, exceeded the jurisdictional minimum.

The insurance companies have failed to point out any time during which it would be *possible* for the *federal* court to enter a judgment for over $10,000. The insurance

companies have failed to point out any time in the federal court suit where there was an actual, justiciable controversy over more than $10,000. It is a legal certainty that a judgment could not have been entered for more than $10,000. To predicate federal jurisdictional amount upon *potential*, but not existent counterclaims would not only be contrary to the expressed and controlling command of Congress, 28 U.S.C. §1332(a), but would raise questions with Constitutional overtones. Federal Courts under Article III of the Constitution may exercise jurisdiction over only actual, justiciable controversies; jurisdictional amount cannot be predicated upon less.

The Petitioner-insurer's allegation, as noted earlier, does not affix jurisdiction for it merely anticipates what the employee may claim. Thus the rule, once federal jurisdiction attaches that it is not ousted by subsequent events, has no application—jurisdiction has not "attached". It is clear under the *Horton* decision that jurisdiction will only be affixed if the employee admits (or fails to deny) he is going to claim more than $10,000 in federal court or counterclaims for such amount. (Subject to his motion to dismiss, Horton admitted he would claim more than $10,000 in federal court and indeed actually counterclaimed for $14,035.) Mr. Justice Black, speaking for the court in *Horton*, stated: "*No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by the petitioner.* * * *" 367 U. S. 348, 353* (emphasis added). The insurance companies have chosen blissfully to ignore

this portion of the Court's holding. We submit that it is the very crux of the *Horton* decision, for if it is ignored the opinion cannot be given a rational explanation.

As noted in the *De Paul Law Review*: "Since these factors [Horton's counterclaim; Horton's admission that he would claim the jurisdictional sum; etc.] all happened *after* the filing of the company's suit, the Supreme Court is relying on events occurring after the suit was filed in the District Court in order to established that the averred $14,035 is in controversy." *9 De Paul Law Review 130, 132 (1961).*

Respondents assume that the Supreme Court meant what it said about the employee's right of denial; thus federal jurisdiction is not affixed until it is determined that the plaintiff's allegation is *correct.*

C. *Amount Claimed Before Board or Amount Claimed in State Court Does NOT Affix Federal Jurisdiction.*

With reference to the amount claimed before the Accident Board, there are several basic principles why such claim should not govern federal jurisdictional amount.

First, and foremost, the Supreme Court in *Horton* expressly rejected such basis for determining federal jurisdic-

Of interest, counsel for the Insurance Company in *Horton* had expressly argued: "Of course, petitioner was not required to counterclaim for $14,035; he could have sued for $9,900 if he desired." Respondent's Reply to Petition for Writ of Certiorari, p. 10; quoted in Reply Brief For the Petitioner, p. 3 (No. 478, October Term, 1960). While the position of the parties in *Horton* is no way controlling upon the present parties, the position that federal jurisdiction can be defeated by counterclaiming for less than $10,000 does seem to have been approved by the Supreme Court.

tion. "It therefore is not controlling here that Texas has held that the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board." 367 U. S. 348 at 353.

Second, only if the suit to set aside the Board's award were an appeal could the amount claimed before the Board be determinative of the amount in controversy. The Supreme Court in *Horton* expressly held that the insurer's suit to set aside the administrative award was an *independent de novo* action. 367 U. S. 348, 354-355. The initial administrative claim merged in the Board's award; and the amount of such initial claim is *not* revived by the filing of suit to set aside the Board's award. This is why it is necessary to counterclaim. The Texas Supreme Court in *Booth v. Texas Employers' Ins. Assn.*, *132 Tex. 237, 249, 123 S. W. 2d 322*, stated:

> "It has repeatedly been held that, although one claim cannot be filed with the Board and another and different claim asserted in court, yet when the injury suffered is of that class of injuries, sometimes called general injuries, for which the compensation is based upon incapacity to work, and not of that class of injuries usually called specific injuries, for which the amount of compensation is fixed by the statute, a general description of the injury is sufficient in the claim made before the board, and that in the suit filed to set aside the award of the board the claim may be enlarged to include all injuries proximately resulting from the accident."

As stated in *Horton*, there is no difference between a suit commenced by an insurer wherein the employee counterclaims for $14,035 and a suit commenced by the employee in which he seeks $14,035 ("No matter which party brings it into court, the controversy remains the same. * * *" 367 U.S. 348, 354). This does not, of course, mean that a suit brought by the insurer to set aside the award in which the employee *does not counterclaim* would involve the same controversy where the employee brings suit or counterclaims. In *Horton*, the employee had counterclaimed for $14,035.

Third, where the matter in controversy in federal court is beneath the jurisdictional minimum, there is no applicable authority which holds that the amount in controversy before an administrative tribunal can be used to satisfy federal jurisdiction amount. Moreover, *Healy v. Ratta*, *292 U. S. 263, 268*, controls to the contrary: "The statute itself does not speak of objects of the suit. It confers jurisdiction only if 'the matter in controversy exceeds [the jurisdictional minimum].'"

With reference to the amount the employee claims in state court, this sum too does not affix federal jurisdiction. The only time the amount claimed in state court would be significant is for purposes of *removal* jurisdiction. There is absolutely no case which has ever held that the amount in controversy in federal court is determined by the sum claimed, or which could be claimed, in a *collateral state* court suit. The

only basis for such argument would be under the principles of *res judicata*. And the Supreme Court has held that the concepts of *collateral estoppel* and *stare decisis* may *not* be utilized in order to manufacture federal jurisdictional amount. *Elgin v. Marshall, 106 U. S. 578; Healy v. Ratta, 292 U. S. 263.*

As discussed in the preceding paragraphs, the amount claimed before the Board or the amount claimed in state court cannot be used to affix federal jurisdictional amount. Where the employee specifically claimed more than $10,000 before the Board, as was done in *Horton*, this might be relevant to find whether the *insurer's* allegation that the employee would claim more than $10,000 in federal court was made in *subjective* good faith. But as stated earlier, the *subjective* faith of the plaintiff-insurer is not at issue since *lack* of jurisdictional amount here appears to a *legal certainty.*

D. *Employee Has Right to Claim Less Than $10,000 in Federal Court and More Than $10,000 in State Court.*

There is no legal inconsistency in holding that the employee has a right to claim less than $10,000 in federal court in order to defeat federal jurisdiction, and subsequently claim more than $10,000 in state court. The employee has such right under decisions by this Court. In *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294*, the Court noted that a party has an absolute right to defeat federal

jurisdiction by pleading for less than the jurisdictional minimum. And where the federal court lacks jurisdiction over a controversy it has no power to interfere with a counterpart suit in state court. 28 U. S. C. §2283; *Amalgamated Clothing Workers v. Richman, 348 U. S. 511.*

If the employee chooses to claim more than $10,000 in state court the insurer's rights as to the federal forum depend upon removal jurisdiction. Congress, which is conferred the right under our Constitution to limit federal district court jurisdiction, has taken away the insurer's right to remove. 28 U. S. C. §1445(c). If the insurer questions the wisdom of such policy, the avenues of congressional appeal are available. And likewise, we do not believe that Judicial Branch should rewrite the jurisdiction statute especially to permit an insurance company to bring suit in federal court where it appears to a legal certainty that the actual controversy is for *LESS* than $10,000. 28 U. S. C. §1332(a).

CONCLUSION

The four dissenting members of this Court in *Horton v. Liberty Mutual, 367 U. S. 348,* stated that the amount in controversy had to be determined from the plaintiff's cause of action without reference to what the defendant would claim. The majority upheld jurisdiction because the plaintiff correctly alleged that the defendant would claim more than $10,000 in federal court. It would appear that the only valid reasoning for granting certiorari here would be if the Court

wished to reexamine the *Horton* decision. In the cases at bar, however, federal jurisdiction does *not* exist under *either* the majority or dissenting views of *Horton*.

Accordingly, Respondents pray that certiorari be denied.

Respectfully submitted,

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